

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs September 26, 2007

ALAN P. WOODRUFF v. ANASTASIA INTERNATIONAL, INC.

**Appeal from the Circuit Court for Sevier County
No. 2006-0180-III Rex Henry Ogle, Judge**

No. E2007-00874-COA-R3-CV - FILED DECEMBER 19, 2007

Alan P. Woodruff ("Plaintiff"), a Tennessee resident, filed suit in Sevier County Circuit Court for breach of contract and other claims against Anastasia International, Inc. ("Defendant" or "Anastasia"), a Kentucky corporation with its principal place of business in the United States in Maine. Defendant raised several affirmative defenses in its answer, including lack of personal jurisdiction and the forum selection clauses in the parties' two contracts. The forum selection clauses provide for disputes between the parties to be litigated in Maine and Kentucky. Defendant then filed a Motion to Dismiss based on the forum selection clauses. On the same day, Defendant also filed a Motion for Order of Reference to Mediation "[s]ubject to its Motion to Dismiss, filed herewith." Several months later, Plaintiff filed a motion requesting the Trial Court to rule on Defendant's Motion to Dismiss. Six days before the hearing on Defendant's Motion to Dismiss, Defendant filed a Supplement to Motion to Dismiss which raised the issue of personal jurisdiction and included an affidavit from Defendant's president setting forth facts in support of the lack of personal jurisdiction defense. Following the hearing, the Trial Court granted Defendant's Motion to Dismiss, holding that the Trial Court lacked personal jurisdiction over Defendant. The Trial Court taxed court costs to Plaintiff. On appeal, we affirm the decision of the Trial Court, although for reasons other than those given by the Trial Court. We hold that Defendant waived its lack of personal jurisdiction defense. However, we also hold that the forum selection clauses in the parties' contracts are valid and enforceable. Therefore, Tennessee is not the proper forum for this lawsuit, and we affirm the dismissal of Plaintiff's lawsuit. We also affirm the Trial Court's assessment of costs to Plaintiff. Affirmed and remanded.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Alan P. Woodruff, Esq., Sevierville, Tennessee, *pro se* Appellant.

Robert A. Crawford, Knoxville, Tennessee, for the Appellee, Anastasia International, Inc.

OPINION

I. Background

Anastasia is in the business of helping men find brides from countries in the former Soviet Union. Anastasia maintains an online database of foreign women who are interested in marrying American men. For a fee, Anastasia translates and delivers letters from a man to his potential bride. Anastasia also translates responses from the women into English for its clients, again for a fee. The second service offered by Anastasia is “Romance Tours” to Russia and other parts of the former Soviet Union. These tours include “socials” and other opportunities to meet local women who are interested in finding a Western husband.

Plaintiff engaged the services of Anastasia in his search for a foreign bride. He corresponded with women from Anastasia’s database through the company’s online service and participated in a Romance Tour to Odessa, Ukraine, from February 8, 2006, through February 19, 2006 (the “Tour”). Plaintiff signed a contract with Anastasia for the Tour (the “Tour Contract”) on January 20, 2006, and he accepted Anastasia’s terms of service for its online services by means of a click-through agreement on Anastasia’s Web site (the “Online Contract”) (collectively the “Contracts”).¹ Plaintiff was dissatisfied with numerous aspects of his transactions with Anastasia, and he sued Anastasia in Sevier County Circuit Court.

In its answer, Anastasia set forth the following Rule 12.02 defenses: lack of subject matter jurisdiction; lack of personal jurisdiction; improper venue; insufficiency of service of process; and failure to state a claim upon which relief can be granted. Anastasia also asked the Trial Court to dismiss Plaintiff’s complaint on the basis of a forum selection clause in each of its contracts with Plaintiff.

Plaintiff filed a Verified First Amended Complaint, which more specifically set forth his claims against Anastasia, asserted that the Trial Court had jurisdiction over the lawsuit, and argued that the forum selection clauses of the Contracts between Plaintiff and Anastasia should not be enforced. On June 9, 2006, Anastasia filed a Motion to Dismiss based on the forum selection clauses in the Contracts and a separate Motion for Order of Reference to Mediation. Anastasia filed its motion for mediation “[s]ubject to its Motion to Dismiss, filed herewith.”

The Trial Court held a hearing on September 5, 2006, after which it made various rulings pertaining to discovery requests by both parties and affirmed its prior order referring the parties to mediation.² Following another hearing on November 24, 2006, the Trial Court appointed a Special

¹The introductory paragraph of Anastasia’s “Terms of Use Agreement” states in pertinent part: “Once you agree to be bound by all provisions of this Terms of Use Agreement, and click on the ‘I Agree’ button, you will be bound by these Terms of Use (this ‘Agreement’), whether or not you register as a member (‘Member’).” Plaintiff does not deny that he clicked on the “I Accept” button, thereby agreeing to abide by Anastasia’s Terms of Use Agreement.

²The Trial Court’s initial order referring Plaintiff and Anastasia to mediation is not part of the record on appeal.

Master to hear the parties' discovery disputes. The Special Master held a hearing on December 19, 2006, and entered an order resolving the discovery disputes the following month. In the meantime, on December 27, 2006, Plaintiff filed a Motion for Ruling on Defendant's Motion to Dismiss. In his motion, Plaintiff stated that the Trial Court previously had deferred ruling on Anastasia's motion until after the parties completed mediation, but that the mediation was being delayed until after the taking of Plaintiff's deposition in May of 2007. Plaintiff asserted that the Trial Court should make a determination of jurisdiction "[t]o avoid unnecessary and costly duplication of efforts," should it be determined that Plaintiff's lawsuit could not be adjudicated by the Trial Court.

On February 20, 2006, only six days before the hearing on Plaintiff's Motion for Ruling on Defendant's Motion to Dismiss and on the Motion to Dismiss itself, Anastasia filed a Supplement to Motion to Dismiss. The supplement clearly raised the issue of lack of personal jurisdiction and attached an affidavit of Anastasia's president setting forth facts in support of its assertion that the Trial Court does not have jurisdiction over Anastasia. The Trial Court granted Anastasia's Motion to Dismiss, holding that the Trial Court lacked personal jurisdiction over Anastasia. The Trial Court assessed half of the costs of the Special Master to each party and ordered Plaintiff to pay all court costs. Plaintiff filed a Motion for Rehearing, which the Trial Court overruled. Plaintiff appeals.

II. Discussion

Plaintiff presents six issues on appeal. However, we believe Plaintiff's issues may be restated properly as follows:

1. Whether the Trial Court erred by granting Anastasia's Motion to Dismiss.
2. Whether the Trial Court erred by taxing all court costs to Plaintiff.

A. Motion to Dismiss

Personal jurisdiction is "the power of the court to render a valid judgment against the defendant." *P.E.K. v. J.M. & C.Y.M.*, 52 S.W.3d 653, 660 (Tenn. Ct. App. 2001). A trial court's determination of personal jurisdiction is a question of law. *In re Clark*, No. W2005-01687-COA-R3-JV, 2007 WL 152537, at *10 (Tenn. Ct. App. W.S., Jan. 22, 2007). We review a trial court's conclusions of law *de novo* with no presumption of correctness. Tenn. R. App. P. 13(d); *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

Plaintiff alleges that the Trial Court erred in holding that it lacked personal jurisdiction over Anastasia. Plaintiff asserts that Anastasia waived its right to pursue this affirmative defense because it filed a motion to compel mediation, participated in discovery proceedings before a Special Master, and otherwise continued to defend the case on its merits. We agree with the foundation of Plaintiff's argument – namely, that Anastasia waived its defense of lack of personal jurisdiction.

Rule 12.02 of the Tennessee Rules of Civil Procedure requires that a defendant set forth its

defenses in its answer or in a motion to dismiss filed before the answer is filed. Tenn. R. Civ. P. 12.02. However, even after raising certain defenses, a party still may be found to have waived those defenses under certain instances. In *Landers v. Jones*, our Supreme Court held that a defendant waives the right to contest personal jurisdiction “when the defendant has recognized the proper pendency of the cause by making a motion that goes to the merits or by filing an answer, without challenging personal jurisdiction.” *Landers v. Jones*, 872 S.W.2d 674, 677 (Tenn. 1994). Furthermore, we have stated that a general appearance, and thus a waiver of the right to contest personal jurisdiction, occurs by “some act or proceeding recognizing the case as being in court, or from the defendant’s seeking, taking, or agreeing to some step or proceeding in the cause beneficial to himself or detrimental to the plaintiff other than one contesting only the jurisdiction of the court.” *Grosfelt v. Epling*, 718 S.W.2d 670, 672 (Tenn. Ct. App. 1986) (citing *Patterson v. Rockwell Int’l*, 665 S.W.2d 96, 99-100 (Tenn. 1984)). Federal courts³ likewise have found that “a defendant may waive a properly-pleaded [sic] personal jurisdiction defense by failing to pursue the defense after including it in an answer.” *Brokerwood Prods. Int’l, Inc. v. Cuisine Crotone, Inc.*, 104 Fed.App’x 376, 379-80 (5th Cir. 2004); see also *Yeldell v. Tutt*, 913 F.2d 533, 539 (2d Cir. 1990) (internal citation omitted) (“Asserting a jurisdictional defect in the answer did ‘not preserve the defense in perpetuity.’”).

In this case, Anastasia filed its Motion for Order of Reference to Mediation contemporaneously with its original Motion to Dismiss. A fair reading of the original Motion to Dismiss shows that it was based only on the forum selection clauses in the Contracts and did not raise the lack of personal jurisdiction. However, even if Defendant’s original Motion to Dismiss is read to have raised the lack of personal jurisdiction, we would reach the same result. We believe that Anastasia’s request for the Trial Court to refer the parties to mediation was a step taken in the Trial Court by Anastasia to benefit itself and, therefore, constitutes a waiver of Anastasia’s personal jurisdiction defense.

Anastasia did file its Motion for Order of Reference to Mediation “[s]ubject to its Motion to Dismiss, filed herewith.” By placing this express reservation in its Motion to Dismiss, we hold that Anastasia maintained its right to assert the forum selection clause defense even though such reservation did not preserve its lack of personal jurisdiction defense. The reservation contained in Defendant’s Motion to Dismiss did not preserve its lack of personal jurisdiction defense because the request for the Trial Court to refer to parties to mediation was inconsistent with the Trial Court lacking personal jurisdiction. The forum selection clause defense stands on a different basis from that of the lack of personal jurisdiction defense. We hold that the reservation contained in Anastasia’s Motion to Dismiss was sufficient to prevent a waiver of the forum selection clause defense. Accordingly, we hold that Anastasia waived its right to contest personal jurisdiction by filing a Motion for Order of Reference to Mediation, and the Trial Court erred in holding otherwise.

³As we have stated previously, “Tenn. R. Civ. P. 12 is substantially identical to Fed. R. Civ. P. 12, making federal court precedents persuasive authority in construing our rule.” *Staats v. McKinnon*, 206 S.W.3d 532, 543 n.13 (Tenn. Ct. App. 2006) (citing *Byrd v. Hall*, 847 S.W.2d 208, 211 n.2 (Tenn. 1993); *Bayberry Assocs. v. Jones*, 783 S.W.2d 553, 557 (Tenn. 1990); *Pacific E. Corp. v. Gulf Life Holding Co.*, 902 S.W.2d 946, 952 n.7 (Tenn. Ct. App. 1995)).

However, this does not end our inquiry. Because the Trial Court found that it lacked personal jurisdiction over Anastasia, it dismissed Plaintiff's lawsuit without ruling on the enforceability of the forum selection clauses contained in the Contracts as raised in Anastasia's Motion to Dismiss. We will now consider the forum selection clauses issue as raised in this appeal.

The Online Contract contains the following provision:

Disputes. If there is any dispute about or involving the Web site and/or the Service, by using the Web site, you agree that the dispute will be governed by the laws of the State of Kentucky without regard to its conflict of law provisions. You agree that all such disputes shall, prior to the institution of litigation, be submitted to mediation in Frankfort, Kentucky. You agree that in the event you initiate litigation, such litigation may only be initiated in the state or federal courts of Frankfort, Kentucky, which courts shall have exclusive personal and subject matter jurisdiction and venue over the entirety of the dispute.

The Tour Contract's forum selection clause requires that "[a]ny mediation or litigation shall take place in Penobscot County, Maine."⁴

Forum selection clauses generally are enforceable by Tennessee courts. *Dyersburg Mach. Works, Inc. v. Rentenbach Eng'g Co.*, 650 S.W.2d 378, 380 (Tenn. 1983). However, Plaintiff alleges that the forum selection clauses in the Contracts are not enforceable because the Contracts are contracts of adhesion. The Tennessee Supreme Court has described contracts of adhesion as follows:

An adhesion contract has been defined as "a standardized contract form offered to consumers of goods and services on essentially a 'take it or leave it' basis, without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or service except by acquiescing to the form of the contract." Black's Law Dictionary 40 (6th ed. 1990); *Broemmer*, 840 P.2d at 1015.

Buraczynski v. Eyring, 919 S.W.2d 314, 320 (Tenn. 1996). Applying this definition, we agree with Plaintiff that his Contracts with Anastasia may well be contracts of adhesion. There was no opportunity to negotiate the terms of the agreements, and we doubt that Anastasia would have provided services to Plaintiff had he refused to accept the terms of the Contracts. However, even if the Contracts are contracts of adhesion, contracts of adhesion are not *per se* unenforceable, as Plaintiff would have us hold. Our Supreme Court has stated as follows regarding this issue:

⁴The record reflects that Anastasia is a Kentucky corporation with its principal place of business in the United States in Bangor, Maine. Anastasia also has an office in Russia.

Our conclusion that the contracts were contracts of adhesion is not, however, determinative of the contract's enforceability. Enforceability generally depends upon whether the terms of the contract are beyond the reasonable expectations of an ordinary person, or oppressive or unconscionable. *Broemmer*, 840 P.2d at 1016.

Id.

After careful consideration, we find nothing in the Contracts which is beyond the reasonable expectations of an ordinary person. While a customer such as Plaintiff would prefer not to have to litigate disputes with Anastasia in a distant state, it is reasonable to expect that a corporation that has customers in many states may want to limit where it is subject to suit. *See, e.g., Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991); *Thomas v. Costa Cruise Lines N.V.*, 892 S.W.2d 837, 841 (Tenn. Ct. App. 1994). Furthermore, Plaintiff presented no evidence supporting his position that the provisions of the Contracts are either unconscionable or oppressive, and we find nothing in the Contracts' forum selection clauses to be either unconscionable or oppressive. The fact that a resident of Tennessee or any other state other than Kentucky or Maine would prefer to sue in his home state rather than in Kentucky or Maine does not, by itself, make the forum selection clauses oppressive or unconscionable. Our acceptance of Plaintiff's position would be to hold that every forum selection clause between a corporation and a Tennessee resident would be unenforceable, at the sole option of the Tennessee resident, if the forum selected is one other than Tennessee. Such is not the law in this state.

Therefore, we conclude that the forum selection clauses are valid and enforceable. Consequently, Tennessee is not the proper forum for Plaintiff's cause of action against Anastasia, and we affirm the Trial Court's dismissal of this lawsuit, although for reasons other than those expressed by the Trial Court. We express no opinion as to whether Kentucky or Maine is the forum where this lawsuit should have been filed, as we hold only that Tennessee is not the proper forum to adjudicate this dispute.

B. Court Costs

We review a trial court's assessment of costs under an abuse of discretion standard. *Lewis v. Bowers*, 392 S.W.2d 819, 823 (Tenn. 1965). Rule 54.04 of the Tennessee Rules of Civil Procedure provides in pertinent part: "Costs included in the bill of costs prepared by the clerk shall be allowed to the prevailing party unless the court otherwise directs, but costs against the state, its officers, or its agencies shall be imposed only to the extent permitted by law." Tenn. R. Civ. P. 54.04(1). Given the Trial Court's dismissal of Plaintiff's complaint and our affirmation of the dismissal, it is clear that Anastasia is the "prevailing party" in this lawsuit. Therefore, the Trial Court did not abuse its discretion by assessing court costs to Plaintiff, and its ruling on this issue is

affirmed.⁵

III. Conclusion

After careful review, we affirm the Trial Court's judgment dismissing Plaintiff's complaint and requiring Plaintiff to pay court costs, and we remand for collection of those costs. Costs on appeal are taxed against the Appellant, Alan P. Woodruff, and his surety, if any.

D. MICHAEL SWINEY, JUDGE

⁵Our ruling on this issue does not affect the Trial Court's assessment of the Special Master's fee. Each party still is required to pay half of the Special Master's fee, in accordance with the Trial Court's order.